Supreme Court, U.S.
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No. 01-

In The

Supreme Court of the United States

PEGGY FARRIOR,

Petitioner,

v.

WATERFORD BOARD OF EDUCATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In reviewing the decision of a district judge to *grant* a motion for a new trial, should an appellate court utilize a greater degree of scrutiny than would be appropriate in reviewing the *denial* of such a motion?

PARTIES

The remaining parties to this proceeding are set forth in the caption.

The original complaint also named twelve individual defendants: Edmond Clark, George Yost, David Cattanach, David Title, David Ruffner, Randall Collins, Betty Bresser, Susan White, Paul Havener, Inez Cullen, Francis Sweeney and Judith Constantine.

The claims against the individual defendants were dismissed on summary judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Peggy Farrior respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 24, 2002.

OPINIONS BELOW

The January 24, 2002, opinion of the court of appeals, which is reported at 277 F. 3d 633 (2d Cir. 2002), is set out at pp. 1a-4a of the Appendix to this petition. The September 30, 1999, opinion of the district court, which is not officially reported, is set out at pp. 5a-29a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on January 24, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 59(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

In 1992 petitioner Peggy Farrior was dismissed from her position as an executive secretary at the Waterford Board of Education. She commenced this action in federal district court, alleging that she had been dismissed in violation of her First Amendment rights. She contended that she was discharged because she had publicly disclosed malfeasance by her supervisors, and that her dismissal was the culmination of a pattern of systematic retaliation against her.

Petitioner's First Amendment claims were tried to a jury in November, 1998. The jury unanimously concluded that Farrior had been dismissed in retaliation for the exercise of her First Amendment right of free speech. The jury awarded Farrior $561,474 in damages. (App. 2a). The respondent Board of Education moved for a new trial, arguing that the jury's verdict was against the weight of the evidence. In September, 1999, the district judge granted the motion because "the verdict in this case appears to the court to be against the weight of the evidence." (App. 28a).

The case was retried before a new jury in December, 2000. The second jury returned a verdict in favor of the defendant.

On appeal Farrior argued that the district judge had erred in granting the new trial, and urged the court of appeals to reinstate the verdict returned by the first jury. Farrior contended that because the request for a new trial had been granted, the court of appeals was obligated to decide *de novo* whether the new trial should have been ordered.[1] The respondent Board of Education insisted, to the contrary, that a decision granting a new trial, like a decision denying a new trial, could be overturned on appeal only if there had been an abuse of discretion.[2]

The court of appeals concluded that the disputed order directing a new trial should be reviewed under the same abuse of discretion standard applied to the denial of a new trial. "A district court's grant of a new trial on the ground that the verdict was against the weight of the evidence is reviewed for abuse of discretion." (App. 2a). The court of appeals in a single sentence summarily concluded that the district court had not abused its discretion in ruling that the verdict of the first jury was against the weight of the evidence. (App. 4a). The appellate decision contained no discussion whatever of the

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[1] Brief of Plaintiff-Appellant Peggy Farrior, No. 01-7049 (2d Cir.), p. 7 ("*De novo* review [is] the proper standard to review the grant of a new trial"); Reply Brief of Plaintiff-Appellant Peggy Farrior, p. 2 ("review of a decision granting a new trial is *de novo.*").

[2] Brief of the Defendant-Appellee Waterford Board of Education, No. 01-7049 (2d Cir.), pp. 22-25.

evidence supporting (or contrary to) the verdict of the first jury, or of Farrior's contention that the district judge had relied heavily on defense testimony which the first jury could reasonably have concluded was untruthful.[3]

REASONS FOR GRANTING THE WRIT

There Is A Conflict Among The Circuits Regarding the Standard of Appellate Review of A Decision Ordering A New Trial

This case presents the issue which this Court granted certiorari to resolve in *District of Columbia v. Tri County Industries, Inc.* (No. 99-1953): whether a decision to *grant* a new trial should on appeal be subject to greater scrutiny than the denial of a request for a new trial.[4] In *Tri County* certiorari was dismissed as improvidently granted. 531 U.S. 287 (2001). The inter-circuit conflict which prompted

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[3] Brief of Plaintiff-Appellant Peggy Farrior, pp. 48-52, 54-56.

[4] The question presented in *Tri County* was:

> "*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), holds that the Seventh Amendment does not preclude district courts from exercising substantial discretion in granting new trials but does constrain appellate review of such orders. The question presented is whether, as some Circuits have recognized, *Gasperini* invalidates the contrary approach of other Circuits, including the D.C. Circuit here, which hold that the Seventh Amendment strictly circumscribes a district court's discretion to grant a new trial and thereby expands the scope of appellate review."

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the grant of certiorari in *Tri County* still exists, and should be resolved by this Court.

A majority of the circuits insist that orders granting new trials should be subjected to greater scrutiny on appeal,[5] reasoning that such careful review is necessary to assure that the Seventh Amendment has not been

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[5] The majority rule has been repeatedly recognized by commentators. 11 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2819 (1995) ("Different considerations apply when the trial court has denied the motion than when it has granted it and the problems must be considered separately."); 1 S. Childress and M. Davis, Federal Standards of Review, § 5.09(B) ("Many courts, especially in the Fifth Circuit, flatly state that their review for abuse of discretion is of a different character for denials than for grants.") (3rd ed. 1999) (footnotes omitted); Federal Procedure: Lawyers Edition, § 58.49 ("The scope of review of an order granting a motion for new trial is somewhat broader than the review of an order denying such a motion. . . . The greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict was against the weight of the evidence.") (2001) (footnote omitted); "What Standards Govern Appellate Review of Trial Court's Conditional Ruling, Pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure On Party's Motion for New Trial," 52 A.L.R. Fed. 494, 496 ("It has been recognized that closer appellate scrutiny is required when a new trial has been granted . . . than when it has been denied."), 496 ("the grant of a conditional new trial pursuant to Rule 50(c)(1) on the grounds that the verdict was against the weight of the evidence requires closer appellate scrutiny than a conditional new trial granted on the basis of legal error, the courts often reasoning that in granting a new trial on a weight of evidence theory, the trial judge takes over, if he does not usurp, the prime function of the jury as the trier of fact, and it then becomes the duty of the appellate court to exercise a closer degree of scrutiny and supervision to protect the litigants' right to jury trial.") (1981).

violated by the trial judge. The "more searching inquiry" utilized by the court of appeals decision in *Tri County Industries v. District of Columbia*, 200 F. 3d 836, 840 (D.C. Cir. 2000), was a recent application of a distinct standard of review that dates from 1960 and has been accepted in seven circuits. Three members of this Court, while serving as circuit judges, joined or wrote opinions endorsing the majority rule. On the other hand, the Fourth and Seventh Circuits, like the Second Circuit in this case, apply to decisions ordering new trials the same highly deferential standard utilized in reviewing the denial of a new trial motion.

Application of the more stringent standard of review is often outcome-determinative. The circuit courts have repeatedly concluded that the close scrutiny rule required the appellate court to redetermine de novo whether a new trial should have been granted, the very standard which petitioner unsuccessfully urged the Second Circuit to apply in this case. (*See* pp. 15-20, *infra*). At the least, that rule means that a trial judge's decision to grant a new trial will be accorded substantially less deference than the denial of a new trial. E.g., *United States v. Cox*, 995 F. 2d 1041, 1044 (11th Cir. 1993) ("we have . . . accorded grants of such motions less deference than denials"); *Hobson v. Wilson*, 737 F. 2d 1, 59 n. 160 (D.C. Cir. 1984) ("our deference to [the trial judge's] judgment is plainly less" where the judge disagreed with the jury verdict) (opinion joined by then Judge Scalia). Although erroneous trial judge decisions granting new trials are sometimes characterized as an "abuse of discretion", "the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new

trial." *United States v. Cox*, 995 F. 2d at 1044. However the close scrutiny standard is formulated, the practical effect is the same; in circuits applying the majority rule, awards of new trials on evidentiary grounds are overturned in many, probably most cases. *See* nn. 12, 19, *infra*.[6] Under the avowedly deferential minority standard, on the other hand, new trial orders are generally upheld. *See* n. 24, *supra*.

The United States in briefs filed in the lower courts has supported strict appellate scrutiny of orders directing new trials.[7] In criminal cases such scrutiny always favors the prosecution, because new trials can only be awarded at the behest of a defendant following a conviction. The Double Jeopardy Clause precludes courts from ordering

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[6] Denials of new trials are subjected only to a deferential abuse of discretion standard, and are rarely if ever reversed on appeal. 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2819 n. 201 ("Actual cases of reversal for this reason are extremely few") (1995).

[7] E.g., Opening Brief for the United States, United States v. Wheat, No. 96-3207 (6th Cir.), pp. 18-19 and n. 11:

> "[I]n reviewing a trial court's decision to *grant* a new trial motion based on the weight of evidence, rather than *deny* such a motion, this Court must more 'closely scrutinize' the trial court's justifications due to the required deference to the factual determinations of the jury. . . . This is true 'because when the jury verdict is set aside usual deference to the trial judge conflicts with deference to the jury on questions of fact.' [*United States v.*] *Cox*, 995 F. 2d [1041,] 1044 [(11th Cir. 1993)]. . . . A district court's grant of a new trial on grounds of weight of the evidence is reviewed under the same standard in civil and criminal cases."

(Emphasis in original).

new trials at the request of the prosecution after an acquittal.

(1) The decision in *Tri County Industries v. District of Columbia*, 200 F. 3d 836, 840 (D.C. Cir. 2000), applying "[a] more searching inquiry" to the grant of a new trial, was only the most recent of a long line of decisions in the District of Columbia Circuit. *See Taylor v. Washington Terminal Company*, 409 F. 2d 145, 148 n. 13 (D.C. Cir. 1969).

> When the district court *denies* a motion for a new trial, our scope of review is particularly narrow because the trial court's decision accords with the jury's. [*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F. 2d 637, 646 (D.C. Cir. 1988)]. Where, as here, however, the trial court *grants* a motion for new trial, "a more searching inquiry is required," *id.*, because of "the concern that a judge's nullification of the jury's verdict may encroach on the jury's important factfinding function." *Vander Zee v. Karabatsos*, 589 F. 2d 723, 729 (D.C. Cir. 1978). . . . This is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence.

Hutchinson v. Stuckey, 952 F. 2d 1418, 1420-21 (D.C. Cir. 1992) (Emphasis in original). "Such a close scrutiny is required in order to protect the litigants' right to jury trial." *Hutchinson*, 952 F. 2d at 1420 (*quoting Lind v. Schenley Indus., Inc.*, 278 F. 2d 79, 90 (3d Cir.) (en banc), *cert. denied*, 364 U.S. 835 (1960)).[8] In all of the six decisions

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[8] The same constitutional explanation for close appellate scrutiny of awards of new trials was quoted in *Langevine v. District of Columbia*, 106 F. 3d 1018, 1023 (D.C. Cir. 1997), *McNeal*, 836 F. 2d at 646-47, *Vander Zee*, 589 F. 2d at 729, and *Taylor*, 409 F. 2d at 148 n. 13.

applying this "close scrutiny" standard the District of Columbia Circuit overturned the trial judge's decision to award a new trial.[9]

The District of Columbia Circuit has also emphasized the difference between the standard of review applicable to grants and that appropriate for denials of new trials by stressing that a greater degree of deference is warranted when a new trial was been denied. Two members of this Court joined those decisions while serving on the District of Columbia Circuit. *Hobson v. Wilson*, 737 F. 2d 1, 58 n. 160 (D.C. Cir. 1984) ("review is particularly narrow when the trial court denies a new trial motion") (*citing Hutchinson*) (opinion joined by then Judge Scalia); *United States v. Dale*, 991 F. 2d 819, 838 (D.C. Cir. 1993) ("Our review of the district court's decision is particularly narrow when the court denies the new trial motion because the court's decision accords with the jury's.") (opinion joined by then Judge Ginsburg.)

The First Circuit also applies a more searching degree of appellate review where a district court has granted a new trial on the ground that the jury verdict was against the weight of the evidence.

> Today it is often said that an appellate court will exercise "a closer degree of scrutiny and supervision" where the basis for the new trial is the

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[9] *Hutchinson, Tri County, Taylor, Vander Zee, McNeal,* and *Langevine.* In *Langevine* the appellate court upheld the decision of a second district judge to reinstate a jury verdict that had been set aside by an earlier judge as against the weight of the evidence.

> trial court's evaluation of the weight of the evidence rather than the trial court's feeling that an "undesirable or pernicious element" such as trial error or prejudicial statements obtruded into the trial.

Borras v. Sea-Land Service, Inc., 586 F. 2d 881, 887 (1st Cir. 1978) (vacating decision ordering new trial). Then Judge Breyer while on the First Circuit joined two opinions endorsing the "closer scrutiny" rule in *Borras*. *Kearns v. Keystone Shipping Co.*, 863 F. 2d 177, 179 (1st Cir. 1988); *Payton v. Abbott Labs*, 780 F. 2d 147, 153 (1st Cir. 1985) (*Borras* rule the "modern trend").

The First Circuit has repeatedly recognized the cognate of the close scrutiny rule, that the decision of a trial judge *denying* a new trial is entitled to greater deference. *Velazquez v. Figueroa-Gomez*, 996 F. 2d 425, 427 (1st Cir. 1993) ("deference . . . particularly appropriate") (opinion joined by then Judge Breyer); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F. 2d 803, 811 (1st Cir. 1988) (limitation on appellate role "especially true" where trial judge denied motion for new trial on ground verdict was against the weight of the evidence.) Where a trial judge had denied a new trial, appellate reversal of that decision would entail an appellate reexamination of the facts found by the jury. But, as then Judge Breyer explained in his opinion for the court in *de Perez v. Hospital del Maestro*, 910 F. 2d 1004 (1st Cir. 1990),

> [t]here is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial [for the] court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge.

910 F. 2d at 1006 (*quoting* 11 C. Wright & A. Miller, Federal Practice & Procedure: Civil, § 2819) (reversing decision ordering new trial.)

The "close scrutiny" standard originated in the oft-cited Third Circuit decision in *Lind v. Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.) (en banc), *cert. denied*, 364 U.S. 835 (1960). *Lind* reasoned that a serious constitutional problem is presented whenever a trial judge orders a new trial on the ground that the jury verdict was against the weight of the evidence.

> [W]here . . . the trial judge . . . grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise *a closer degree of scrutiny* and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

278 F. 2d at 90 (Emphasis added). Since the 1960 decision in *Lind*, the Third Circuit has repeatedly reaffirmed its adherence to the close scrutiny rule.[10] *Lind* and several

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[10] *Wilburn v. Maritrans GP Inc.*, 139 F. 3d 350, 363 (3d Cir. 1998); *Fineman v. Armstrong World Industries, Inc.*, 980 F. 2d 171,

subsequent Third Circuit decisions apply a second, related rule, refusing to accord almost any deference to the trial judge's decision where the underlying factual dispute was a straightforward question involving matters readily understood by a jury.[11] Not surprisingly, most of the reported Third Circuit decisions applying the close scrutiny rule have reversed the new trial order in question.[12]

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211 (3d Cir. 1992); *Hourston v. Harvlan, Inc.*, 457 F. 2d 1105, 1107 (3d Cir. 1972); *Klein v. Hollings*, 992 F. 2d 1285, 1289-90 (3d Cir. 1993); *Grove v. Dun & Bradstreet, Inc.*, 438 F. 2d 433, 438 (3d Cir. 1971); *Lewin v. Metropolitan Life Insurance Company*, 394 F. 2d 609, 614-15 (3d Cir. 1968); *Silverii v. Kramer*, 314 F. 2d 407, 413 (3d Cir. 1963).

[11] *Klein v. Hollings*, 992 F. 2d 1285, 1290 (3d Cir. 1993) (decision of "the district court receives the least deference [where] it concerns a matter . . . easily understood by a jury"); *Hourston v. Harvlan, Inc.*, 457 F. 2d 1105, 1107 (3d Cir. 1972) (need for closer scrutiny "especially true" if the subject matter of the dispute is familiar and simple); *Lind*, 278 F. 2d at 91 (reversal of new trial order appropriate because the "subject matter of the litigation . . . is simple and easily comprehended by any intelligent layman").

[12] Orders granting new trials were reversed or vacated under that standard in *Lind*, *Grove*, *Lewin*, *Hourston*, and *Klein*. New trials were also reversed in *Olefins Trading, Inc. v. Han Yang Chem. Corp.*, 9 F. 3d 282 (3d Cir. 1993), *Williamson v. Consolidated Rail Corp.*, 926 F. 2d 1344 (3d Cir. 1991), and *Fassbinder v. Pennsylvania Railroad Co.*, 322 F. 2d 859 (3d Cir. 1963). Orders granting new trials on the ground that the verdict was against the weight of the evidence were upheld under the close scrutiny standard in *Fineman*, *Wilburn*, and *Silverii*.

The Fifth Circuit has issued fourteen published decisions endorsing the close scrutiny rule;[13] "in this circuit

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[13] *Pagan v. Shoney's, Inc.*, 931 F. 2d 334, 337 (5th Cir. 1991) (*quoting Conway*); *Jones v. Wal-Mart Stores, Inc.*, 870 F. 2d 982, 986 (5th Cir. 1989) ("Our standard of review is somewhat narrower when a new trial is denied, and somewhat broader when a new trial is granted."); *Eximco, Inc. v. Trane Co.*, 737 F. 2d 505, 512 (5th Cir. 1984) ("[w]hen the district court grants a new trial . . . our inquiry is broader"); *Carson v. Polley*, 689 F. 2d 562, 570 (5th Cir. 1982) ("Our review of a district court's decision to grant a new trial is broader than our review of a district court's denial of a new trial"); *National Service Industries v. Hartford Acc. & Indem.*, 661 F. 2d 458, 461 (5th Cir. 1981) ("a more probing review applies to a grant of a new trial"); *Evers v. Equifax, Inc.*, 650 F. 2d 793, 796-97 (5th Cir. 1981) ("broader review applies to an order granting a new trial as opposed to an order denying such a motion"); *Hadra v. Herman Blum Consulting Engineers*, 632 F. 2d 1242, 1244 (5th Cir. 1980) ("closer scrutiny is required in reviewing a district court's order granting a new trial on the ground that the jury's verdict was based on insufficient evidence."); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F. 2d 360, 362-63 (5th Cir. 1980) (Fifth Circuit precedent applies a "broader review . . . to orders that *grant* new trials, mandating the greatest degree of scrutiny where . . . a new trial is decreed on the ground that the verdict is against the weight of the evidence.") (emphasis in original); *Love v. Sessions*, 568 F. 2d 357, 360 (5th Cir. 1978) ("cases in this Circuit apply a somewhat broader review to an order granting the motion for a new trial than to an order denying such a motion"); *Spurlin v. General Motors Corp.*, 528 F. 2d 612, 618 (5th Cir. 1976) (adopting rule applied in other circuits which "carefully distinguished the situation where the trial court has granted a new trial on the grounds of insufficiency of the evidence, since by so doing the court is in a sense intruding upon the jury's function and affecting a litigant's Seventh Amendment rights."); *Woods Explor. & Pro. Co., Inc. v. Aluminum Co. of Am.*, 509 F. 2d 784, 792 n. 3 (5th Cir. 1975) (noting "distinctions" between standard of review depending on whether motion for new trial was granted

as in several others, we apply a broader review to orders granting new trials than to orders denying them." *Shows v. Jamison Bedding, Inc.*, 671 F. 2d 927, 930 (5th Cir. 1982). Another half dozen Fifth Circuit decisions adopt the cognate rule that denials of new trial motions are entitled to particular deference.[14] "[T]he greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict is against the weight of the evidence." *Evers v. Equifax*, 650 F. 2d 793, 796-97 (5th Cir. 1981).[15]

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or denied); *Massey v. Gulf Oil Corp.*, 508 F. 2d 92, 94 (5th Cir. 1975) ("Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial."); *O'Neil v. W.R. Grace & Co.*, 410 F. 2d 908, 914 (5th Cir. 1969) (*quoting Lind*).

[14] *Brady v. Fort Bend County*, 145 F. 3d 691, 713 (5th Cir. 1998) ("Our review of a district court's decision to deny a motion for new trial is more deferential than our review of the district court's decision to grant such a motion."); *Pryor v. Trane Co.*, 138 F. 3d 1024, 1026 (5th Cir. 1998) ("our review is more narrow when a new trial is denied than when one is granted."); *Knight v. Texaco, Inc.*, 786 F. 2d 1296, 1299 (5th Cir. 1986) (*quoting Shows*); *Dixon v. International Harvester Co.*, 754 F. 2d 573, 586 (5th Cir. 1985) ("deferential standard of review applies especially in cases in which motions for new trials have been denied."); *Reeves v. General Foods Corp.*, 682 F. 2d 515, 519 n. 6 (5th Cir. 1982) (*quoting Franks*); *Franks v. Associated Air Center, Inc.*, 663 F. 2d 583, 586 (5th Cir. 1981) ("Where the trial judge has denied the motion and left the decision of the jury undisturbed, this circuit has shown even greater deference to the trial judge's discretion.").

[15] *Shows v. Jamison Bedding, Inc.*, 671 F. 2d at 930 ("where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigant's right to a jury trial."); *National Service Industries v. Hartford Acc. & Indem.*, 661 F. 2d at 461 (requirement of more probing review applies "especially when [the grant of a

Where a new trial has been ordered on that basis, and the factual disputes were not complex, the Fifth Circuit will make a de novo[16] determination of whether a new trial should have been granted.

> [T]hree factors militate against new trials and require a particularly searching review of the evidence: simplicity of the issues, the extent to which the evidence is in dispute, and the absence of any pernicious or undesirable occurrence at trial. . . . When all three factors are present, our deference to the jury is reinforced by our confidence in its ability to understand the issues, to evaluate the credibility and sort through conflicting testimony, and to act reasonably and fairly in the absence of prejudicial influences. In this situation there is little if any need to defer to the judge as against the jury, and we will not affirm an order granting a new

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new trial was] based on weight of evidence grounds."); *Love v. Sessions*, 568 F. 2d at 361 ("cases in this Circuit . . . exercise the greatest degree of scrutiny when a new trial is granted on the ground that the verdict is against the weight of the evidence."); *Woods Explor. & Pro. Co., Inc. v. Aluminum Co. of Am.*, 509 F. 2d at 792 n. 3 (*quoting Massey*); *Massey v. Gulf Oil Corp.*, 508 F. 2d 92, 95 (5th Cir. 1975) ("when a new trial is granted on the ground that the verdict is against the weight of the evidence we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury.").

[16] *See Spurlin*, 528 F. 2d at 621 ("*we* have studied the record carefully and have concluded that the jury verdict was not against the '*great* weight of the evidence,' as required in this Circuit to justify a grant of a new trial.") (first emphasis added).

> trial unless on review *we* are satisfied, *independently*, that the jury verdict was against the great weight of the evidence.

Shows v. Jamison Bedding, Inc., 671 F. 2d 927, 930-31 (5th Cir. 1982) (Emphasis added).[17] The Fifth Circuit insists that its standard of close appellate scrutiny is required "to protect a litigant's Seventh Amendment rights and to prevent improper intrusion on the jury's function." *Evers*, 650 F. 2d at 796.[18]

The Eleventh Circuit follows the practice of the Fifth Circuit in engaging in close scrutiny of a new trial order and in applying a particularly stringent standard of

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[17] These three factors were also said to warrant particularly probing review in *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F. 2d 360, 363 (5th Cir. 1980), and *Spurlin v. General Motors Corp.*, 528 F. 2d 612, 620 (5th Cir. 1976).

[18] *Eximco, Inc. v. Trane Co.*, 737 F. 2d at 512 ("The difference in our inquiry stems from our respect for the jury as an institution and from our concern that the party who initially persuaded the jury should not be stripped unfairly of a favorable decision."); *Carson v. Polley*, 689 F. 2d at 570 ("The difference in our standard of review of orders granting new trials and those denying new trials stems from our respect for a verdict by a properly functioning jury. When the trial court grants a new trial because of a disagreement with the jury over the interpretation of the evidence, we review such a decision carefully to ensure that the party who persuaded the jury is not unfairly stripped of its verdict."); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F. 2d at 363 (greater scrutiny given to orders directing new trials "to assure that the judge does not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury."); *Massey v. Gulf Oil Corp.*, 508 F. 2d at 95 ("closer scrutiny . . . protect[s] the litigant's right to jury trial.").

review where the factual dispute was not a complicated one.

> Where the grant is on the ground that the verdict is against the weight of the evidence, we exercise close scrutiny out of deference to the right of a litigant to have a jury determination of the facts. . . . We have said that there are some gradations in the strictness of our review in those instances where the issues are highly complex, being more strict in our review when the issues are simple and the outcome largely dependent upon the credibility of witnesses.

Deas v. Paccar, Inc., 775 F. 2d 1498, 1503-04 (11th Cir. 1985).

> When a district court grants a new trial because the verdict is against the weight of the evidence, this court's review will be extremely stringent to protect a party's right to a jury trial. . . . This is particularly true when the new trial is premised upon sufficiency of the evidence. . . .

Redd v. City of Phenix City, Ala., 934 F. 2d 1211, 1215 (11th Cir. 1991). In most of the cases in which it has applied this close scrutiny standard the Eleventh Circuit has reversed the grant of a new trial.[19]

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[19] The Eleventh Circuit has invoked the close scrutiny standard in reversing new trial orders in at least twelve cases. *Hardin v. Hayes*, 52 F. 3d 934, 938 (11th Cir. 1995) ("rigorous standard of review" of order granting new trial); *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F. 3d 1198, 1201 (11th Cir. 1993) (*quoting Redd*); *United States v. Cox*, 995 F. 2d 1041, 1044 (11th Cir. 1993) ("we more closely scrutinize a court's grant of a new trial. . . . [W]e have, not surprisingly, accorded grants of such motions less deference than denials."); *Redd*, 934 F. 2d at 1216; *Rixey v. West Paces Ferry Hospital, Inc.*, 916 F. 2d 608, 612 (11th Cir. 1990)

The Eleventh Circuit has candidly acknowledged that its standard often entails a de novo determination.

(*quoting Hewitt*); *Clyce v. St. Paul Fire & Marine Insurance Co.*, 850 F. 2d 1398, 1402 (11th Cir. 1987) ("this court's review must be especially stringent so as to protect the litigant's right to a jury trial."); *Watts v. Great Atlantic and Pacific Tea Co., Inc.*, 842 F. 2d 307, 311 (11th Cir. 1988) ("our review should be rigorous if the motion [for a new trial] is granted rather than denied, . . . , and if the basis for the motion was . . . the weight of the evidence."); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F. 2d 1493, 1498 (11th Cir. 1987) ("we should more strictly scrutinize orders which *grant* new trials, where the basis for the order is that the verdict is against the weight of the evidence. . . . That level of scrutiny assures that the judge does not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury."); *Fondren v. Allstate Insurance Co.*, 790 F. 2d 1533, 1534 (11th Cir. 1986) (*quoting Hewitt*); *Hewitt v. B.F. Goodrich Co.*, 732 F. 2d 1554, 1556 (11th Cir. 1984) ("A district court ruling on a motion for a new trial is generally reviewed under an abuse of discretion standard. When the trial court grants a new trial our review is broader and requires stringent application of the same standard."); *Williams v. City of Valdosta*, 689 F. 2d 964, 974-75 (11th Cir. 1982) ("if the trial court granted the motion for a new trial, review by the appellate court is more stringent. . . . [R]eview by the appellate court will be more rigorous when the basis for the motion was the weight of the evidence. . . . If the record further discloses that the issues were relatively simple and the facts hotly contested, then we would also be correct in holding the trial court to a slightly higher standard."); *J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co.*, 677 F. 2d 1365, 1373 (11th Cir. 1982) (a new trial based on the weight of the evidence may only be granted if "the jury's verdict is against the great weight, not merely the greater weight, of the evidence. . . . This standard embodies a concern that the jury's verdict should not lightly be disregarded. To further ensure against this danger, a stringent and searching review is undertaken on appeal.").

> [T]he label "abuse of discretion" belies the standard of review that we actually apply to grants of motions for a new trial. We may conclude that the district court overreached its authority if *our* review of the record reveals that the evidence did not predominate heavily against the jury's verdict. In this case, the evidence does not contravene . . . the verdict. Accordingly, we reverse.

United States v. Cox, 995 F. 2d 1041, 1044 (1993) (Emphasis added). Similar de novo determinations were made by the court of appeals in *Watts v. Great Atlantic and Pacific Tea Co., Inc.*, 842 F. 2d 307, 311 (11th Cir. 1988) ("the testimony introduced by the plaintiff is sufficient *to convince us* that the jury verdict was not against the 'great weight' of the evidence") (emphasis added), and *Hardin v. Hayes*, 52 F. 3d 934, 939-40 (11th Cir. 1995) ("The first jury's verdict . . . was not against the great weight of the evidence. . . . *In our view*, the jury was entitled to conclude [that the defendants had not violated the constitution]") (emphasis added).

In reversing the award of a new trial in *Homes v. City of Massilon, Ohio*, 78 F. 3d 1041 (6th Cir. 1996), the Sixth Circuit also made its own de novo determination of whether a new trial was warranted.

> [I]n reviewing a trial court's decision [to grant a new trial based on the weight of the evidence], we must closely scrutinize the trial court's justifications in order to protect the litigant's right to a jury trial. . . . [T]his Circuit has determined

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The Eleventh Circuit upheld a new trial under the close scrutiny standard in *Deas* and *Ard v. Southwest Forest Industries*, 849 F. 2d 517 (11th Cir. 1988).

> that a jury's verdict should not be overturned as against the weight of the evidence unless that verdict was unreasonable. . . . [T]he district court determined that the evidence did not support a finding of excessive force. . . . *We disagree and find* that a reasonable juror could find for [the plaintiff] on the excessive force claim.

78 F. 3d at 1047-48 (Emphasis added).[20]

The Eighth Circuit made a similar de novo[21] determination in applying the close scrutiny standard in *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F. 2d 179 (8th Cir. 1972).

> It has been recognized in the *Lind* case . . . that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the appellate court should "exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to jury trial. . . . "
>
> In the present case *we find* that the evidence presented does not require reconsideration by a new jury. The evidence is such that reasonable men may differ as to the result, therefore, the determination should properly be left for the jury.

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[20] The Sixth Circuit also applied the close scrutiny standard in *United States v. Wheat*, 2000 WL 32044 *1 (6th Cir. 2000) and *Duncan v. Duncan*, 377 F. 2d 49, 54-55 (6th Cir. 1967).

[21] A similar de novo determination can be found in *McGee v. South Pemiscot School Dist. R-V*, 712 F. 2d 339, 344-45 (8th Cir. 1983) ("*We* are confident that the jury verdict in favor of McGee was not a manifest injustice. . . . *We* are not convinced that the jury committed a manifest injustice.") (emphasis added) (overturning order directing new trial).

466 F. 2d at 187 (emphasis added).[22] In *Reed Brothers, Inc. v. Monsanto Co.*, 525 F. 2d 486, 499 (8th Cir. 1975), then retired Justice Clark endorsed the close scrutiny rule in *Fireman's Fund*. This close scrutiny of orders granting new trials stands in stark contrast to the Eight Circuit's view that a district court decision *denying* a motion for new trial is virtually unreviewable on appeal. *Czajka v. Black*, 901 F. 2d 1484, 1485 (8th Cir. 1990) (trial judge's denial of new trial "virtually unassailable on appeal"); *Peterson by Peterson v. General Motors Corp.*, 904 F. 2d 436, 440 (8th Cir. 1990) (same).

(2) Several circuits, on the other hand, have clearly rejected the close scrutiny rule, and instead apply the same highly deferential standard of review regardless of whether the new trial was granted or denied. The Fourth Circuit has emphatically disagreed with the close scrutiny rule in *Lind*.

> [Defendant] invites us to follow *Lind* . . . where the Third Circuit states that a two step analysis should be followed in reviewing a district court's reasons for ordering a new trial. If the new trial is ordered because of procedural irregularities which could have affected the jury's decision, strict review is not warranted. However, if the judge orders a new trial because he believes the verdict is against the clear weight of the evidence, the reviewing court is urged to apply a stricter standard of review. We decline

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[22] The Eighth Circuit recently reiterated its endorsement of the close scrutiny rule in *Dominium Management v. Nationwide Housing Group*, 195 F. 3d 358, 366 (8th Cir. 1999).

> [defendant's] invitation to adopt Third Circuit law. . . .

Gill v. Rollins Protective Services Co., 836 F. 2d 194, 196 n. 1 (4th Cir. 1987). In the Fourth Circuit an order granting a new trial, like a denial, can only be overturned on appeal under "the most exceptional circumstances." *Wadsworth v. Clindon*, 846 F. 2d 265, 266 (4th Cir. 1988) ("The granting of a new trial is a matter resting in the sound discretion of the trial judge, and his action is not reviewable upon appeal except in the most exceptional circumstances"). The Fourth Circuit has repeatedly reaffirmed the applicability of this exceedingly restrictive standard to appellate review of orders granting a new trial.[23] Unlike the practice in circuits utilizing close scrutiny, which have reversed a majority of new trial orders considered on appeal, in the Fourth Circuit most such orders have been upheld.[24]

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[23] *E.g., Nichols v. Ashland Hospital Corp.*, 251 F. 3d 496, 500 (4th Cir. 2001); *Eberhardt v. Integrated Design & Construction, Inc.*, 167 F. 3d 861, 869 (4th Cir. 1999); *Collins Entertainment Corp. v. Infinational Technologies, Inc.*, 1998 WL 225138 *4 (4th Cir.); *Laubach v. Khajawai*, 1995 WL 508879 *2 (4th Cir.); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F. 3d 182, 185 (4th Cir. 1994); *Reed v. Maritrans Operating Partners Ltd. Partnership*, 1994 WL 463412 *5 (4th Cir.); *Lindner v. Durham Hosiery Mills, Inc.*, 761 F. 2d 162, 167 (4th Cir. 1985); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350, 354 (4th Cir. 1941) (award of new trial not reviewable on appeal "save in the most exceptional circumstances.").

[24] Since January, 1998, the Fourth Circuit has applied this deferential standard in eight cases, and upheld the new trial order in six of those cases. *Essex v. Prince George's County, Maryland*, 2001 WL 945860 *1 (4th Cir.) (new trial order affirmed); *Henley v. FMC Corp.*, 2001 WL 733110 *1 (4th Cir.)

Until recently the Seventh Circuit had adhered to the close scrutiny rule. *E.g. Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F. 2d 238, 247 (7th Cir. 1992). In the wake of this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), however, the Seventh Circuit has now expressly repudiated that rule.

> At one time we [reviewed new trial decisions] "somewhat more exacting[ly]" when the district court granted a new trial because of Seventh Amendment considerations. *Superbird*. . . . However, in light of the Supreme Court's decision in *Gasperini* that an abuse of discretion standard does not violate the Seventh Amendment, . . . we hereby abandon this practice as unnecessary. . . . [T]his opinion overrules *Superbird* . . . to the extent that it held that we apply the abuse of discretion standard of review "somewhat more exacting[ly]" when the district court granted a motion for a new trial.

Medcom Holding Co. v. Baxter, 106 F. 3d 1388, 1397 and n. 3 (7th Cir. 1997).

(3) The instant case presents precisely the sort of circumstances in which it is of controlling importance

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(new trial order affirmed); *United States v. Fulcher*, 250 F. 3d 244, 249 (4th Cir. 2001) (new trial order affirmed); *United States v. Pritt*, 2000 WL 1699833 *5 (4th Cir.) (new trial order reversed); *Conner v. Schrader-Bridgeport, Int'l*, 227 F. 3d 179, 200 (4th Cir. 2000) (new trial order reversed); *United States v. Purnell*, 1998 WL 405942 *1-*2 (4th Cir.) (new trial order affirmed); *Hines v. Baltimore Gas & Electric Co.*, 1998 WL 31751 *1 (4th Cir.) (new trial order affirmed); *Konka v. Wal-Mart Stores*, 1998 WL 24378 *4-*5 (4th Cir.) (new trial order affirmed).

which standard of appellate review is applied. The factual issue presented to the jury was straightforward and non-technical; the jury was asked to determine whether the Waterford Board of Education decided to dismiss Farrior because of her constitutionally protected speech. That factual issue was hotly contested, and turned to a substantial degree on the credibility of the Board officials who testified at trial.[25]

The district judge below based his new trial order solely on his view of the comparative weight of the evidence. Such a new trial order is subject to the most exacting scrutiny in the circuits applying the close scrutiny rule, and would be reconsidered de novo in at least the Fifth and Eleventh Circuits. There is little chance that the decision of the district judge in this case would be upheld in any of the circuits utilizing the close scrutiny standard.

The Second Circuit, however, rejected our request for de novo review or some other form of close scrutiny.

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[25] The closing argument of both trial attorneys attacked the credibility of the opposing witnesses. *Compare* Transcript of November 12, 1998 (closing argument for plaintiff), pp. 22 (statement of defense witness was "totally false"), 24 (statement of defense witness "doesn't make any sense. It's clearly not the truth."), 25 (defendant "rather incredibly" disputes plaintiff's version of events), 26 ("The defendant's credibility . . . , to be charitable, is poor. You could evaluate [the key defense witness] for yourself when he was on the stand."), *with id.* (closing argument for defendant) at 41 ("it's inconsistencies in [the testimony of plaintiff's witnesses] that is somewhat telling"), 53 (document assertedly "contradict's [plaintiff's] testimony given here under oath.").

Instead, the panel applied an indulgent abuse of discretion standard, under which there was no need for the appellate opinion to evaluate any of the evidence in the case. Under the Second Circuit standard it was unnecessary for the appellate court even to consider expressly (if at all) the evidence that supported the jury verdict, or to inquire whether the case turned (and the district judge's decision thus rested on his own assessment of) the credibility of the witnesses.

The question presented by this conflict in the circuits is of fundamental constitutional importance. Where a trial judge mistakenly denies a motion for a new trial, that error (at least ordinarily) is only a routine matter of civil procedure. But if a trial judge improperly grants such a motion on the ground that the verdict was contrary to the weight of the evidence, that error ipso facto violates the Seventh Amendment. The standard governing when such a motion can be granted necessarily derives from the reexamination clause of the Seventh Amendment, and a new trial order violating that standard is unconstitutional. Thus the question before the Second Circuit in this case was whether the trial judge had violated the Seventh Amendment in ordering a new trial. The Second Circuit emphatically did not purport to conclude that the Seventh Amendment had been obeyed; it simply deferred to the views of the very trial judge alleged to have violated the constitutional command at issue.

The circuits applying the close scrutiny standard of review properly recognize that an independent determination of whether the Seventh Amendment has been violated must be made by a court other than the very

court alleged to have committed the constitutional violation in question. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court held that an appellate court as well as a trial court must make a de novo determination of whether a jury's punitive damage award violated the Due Process Clause. If *two* courts are required to determine de novo whether a punitive damage award violated the Due Process Clause, at least *one* independent court should be required to determine de novo whether a new trial order violated the Seventh Amendment.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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277 F.3d 633

United States Court of Appeals,
Second Circuit.

Peggy FARRIOR, Plaintiff-Appellant,
v.
WATERFORD BOARD OF EDUCATION,
Defendant-Appellee, Town of Waterford, Edmond Clark, George Yost, David Cattanach, David Title, David Ruffner, Randall Collins, Betty Bresser, Susan White, Paul Havener, Inez Cullen, Francis Sweeney And Judith Constantine, Defendants.

Docket No. 01-7049.

Argued Oct. 16, 2001.
Decided Jan. 24, 2002.

Joseph D. Garrison, (*Jeffrey S. Bagnell*, on the brief), Garrison, Phelan, Levin-Epstein, Chimes & Richardson, P.C., New Haven, CT, for Plaintiff-Appellant.

Michael Peter Mckeon, Sullivan, Schoen, Campane & Connon, LLC, Hartford, CT, for Defendant-Appellee.

Before: *WALKER*, Chief Judge, *MESKILL*, Circuit Judge, and *KOELTL*, District Judge.[1]

PER CURIAM.

Following her termination as an executive secretary, plaintiff-appellant Peggy Farrior sued the Waterford Board of Education ("the Board") and a group of individual defendants under 42 U.S.C. § 1983, alleging, among other claims, that the Board had violated her First

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[1] The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

Amendment rights by discharging her for publicly disclosing misfeasance by her supervisor and by ratifying systematic retaliation against her by her supervisors. Farrior's other claims against the Board were dismissed on summary judgment, as were all of her claims against the individual defendants. Farrior's First Amendment claim was tried to a jury, which found in her favor and awarded $561,474 in damages. The district court then granted the Board's Rule 59 motion for a new trial on the ground that the jury's verdict was against the weight of the evidence. A second jury trial resulted in a verdict in favor of the Board. Farrior now appeals the district court's grant of a new trial.

A district court's grant of a new trial on the ground that the verdict was against the weight of the evidence is reviewed for abuse of discretion. *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 201-02 (2d Cir.1995), *abrogated on other grounds, Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir.1997). A grant of a new trial on the ground that the verdict was against the weight of the evidence is appropriate if "the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir.1998) (internal quotation marks omitted). In determining whether the jury's verdict is so "seriously erroneous" as to justify a new trial, the trial judge is free to weigh the evidence and "need not view it in the light most favorable to the verdict winner." *Id.* at 134.

Although the district court's opinion as a whole makes it clear that the right standard was applied and thus we can easily affirm the judgment, we write to clarify one passage. The district court's opinion states

that a new trial is appropriate "if the jury's verdict is seriously erroneous or constitutes a miscarriage of justice, or the verdict appears . . . to be against the weight of evidence." *Farrior*, No. 3:93-1585, slip op. at 3 (D.Conn. Sept. 30, 1999) (internal quotation marks and citations omitted). That passage could be interpreted as stating that a new trial is appropriate if a) the verdict is seriously erroneous, b) the verdict is a miscarriage of justice, or c) the verdict is against the weight of the evidence. That understanding of the law would be erroneous because "seriously erroneous" and a "miscarriage of justice" are just descriptions of the standard that courts apply in determining whether a verdict is "against the weight of evidence." However, the district court's formulation could also be read as a restatement: a decision is against the weight of the evidence, for purposes of a Rule 59 motion, if and only if the verdict is seriously erroneous or a miscarriage of justice. Such a reading is correct and follows the reading we place on other prior decisions of this court that have used constructions similar to the district court's formulation. *See, e.g., U.S. E. Telecomms., Inc., v. U.S. W. Communications Servs., Inc.*, 38 F.3d 1289, 1301 (2d Cir.1994); *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 691 (2d Cir.1983). We are confident that the district court in this case applied the correct standard, in light of its correct statement that a "jury's verdict . . . should rarely be disturbed" (quotation marks and citation omitted) and its extensive, careful consideration of the evidence throughout its opinion.

Nonetheless, district courts should be careful in their descriptions of the standards that they are applying. Statements that are unclear as to whether a disjunction or

restatement is intended could necessitate a remand for clarification in a case where it is not apparent from the remainder of the district court's opinion that the correct standard was applied. We disfavor formulations such as the one used by the district court in this case. Because it is clear that the district court applied the correct standard, and that the district court did not abuse its discretion in concluding that the jury's verdict was "seriously erroneous" or a "miscarriage of justice," and thus against the weight of the evidence, we affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PEGGY FARRIOR, Plaintiff,	:	
v.	:	Civil Action No: 3:93CV01585 (AWT)
WATERFORD BOARD OF EDUCATION, Defendant.	:	

RULING ON MOTION FOR NEW TRIAL

After a jury verdict in favor of the plaintiff, Peggy Farrior ("Farrior"), the defendant, the Waterford Board of Education (the "Board"), moves for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, the court is granting the Board's motion for a new trial.

I. Background

This case went to trial on two claims made by Farrior in connection with the termination of her employment by the Board. Her first claim was that the Board terminated her employment in violation of her rights under the First Amendment. Her second claim was that the Board ratified a retaliatory systematic attack on her performance by one or more of her supervisors in violation of the First Amendment. The jury found for the plaintiff on both claims.

In connection with the plaintiff's first claim, the jury was instructed that it must first determine whether Farrior made statements to Board members regarding alleged unethical business practices by her supervisor, Edmund Clark ("Clark"), in connection with the services for the blind, or alleged mismanagement of funds by Clark in connection with the purchase of computers. It was instructed that if it determined that Farrior did, in fact, make such statements to Board members, it must next determine whether her speech was a substantial or motivating factor in the decision by the Board to terminate her employment. The jury was also instructed as to this claim that if it found that Farrior's speech was a substantial or motivating factor in the Board's decision to terminate her employment, it must consider whether the Board established that it would have reached the same decision to take action against Farrior even in the absence of the impermissible reason.

The jury was instructed as to the second claim that it must determine, first, whether Farrior had established that one or more of her supervisors conducted a systematic attack on her performance in retaliation for her engaging in speech protected by the First Amendment and, second, whether the Board approved both (i) that systematic attack on her performance conducted by one or more of her supervisors, and (ii) the intention of that supervisor or those supervisors to retaliate against Farrior because she engaged in that protected speech.

II. Legal Standard

Rule 59 states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). A rule 59 motion may be granted if the jury's verdict is "seriously erroneous or constitutes a miscarriage of justice," *Purnell v. Lord*, 952 F.2d 679, 686 (2d Cir. 1992), or the "verdict appears . . . to be against the weight of evidence, *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998). A new trial may be granted even where there is substantial evidence to support the jury's verdict. *See Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992). In ruling upon a motion for a new trial, the court may weigh the evidence adduced at trial and is not bound to view the evidence in a light most favorable to the non-movant. *See id.* The jury's verdict, however, "should rarely be disturbed." *Dunlap McCuller v. Reise Organization*, 980 F.2d 153, 158 (2d Cir. 1992).

III. The Evidence At Trial

Farrior began working in the Board's business office in 1985. From Farrior's arrival at the business office through the middle of 1990, no adverse employment action was taken against her. Farrior's supervisor was Edmund Clark. He did not give her a warning or reprimand prior to November of 1990.

On September 14, 1990, the director of personnel, David Title ("Title"), sent Farrior a three-year employment contract, signed by the Superintendent, William Cattanach ("Cattanach"), on September 14, 1990, with an attached copy. On October 18, 1990, Farrior returned a copy of the September 14, 1990 contract to Title, unsigned. On October 25, 1990, Farrior met with Title to discuss several terms of the contract. Farrior testified that on October 25, 1990 she tendered a signed copy of the September 14, 1990 contract to Title in order to express her good faith acceptance of the contract and her contentment with the salary increase, although she wished to modify other contract terms with which she was less pleased. However, Title testified that he was never given a copy of the September 14, 1990 employment contract with Farrior's signature. Also, after the expiration of her August 31, 1990 contract, Farrior continued to be paid according to the rate provided therein.

On November 1, 1990, Farrior wrote a memorandum to Title specifying terms she viewed as unsatisfactory in the September 14, 1990 contract and requesting changes. On November 6, 1990, Title responded to Farrior's requests with a memorandum and second contract. That day, Farrior walked to Title's office, expressed her anger over the new contract and "stormed out." Tr. Farrior, 11/2/98, at 21, ln. 1. Farrior returned to her office and in the presence of her supervisor, Clark, referred to Title as a "fucking bastard," *Id.* at 21, ln. 21, and tore up the November 6, 1990 contract. Following Clark's suggestion, Farrior took the rest of the day off. The next morning Farrior informed Clark that she "needed some time from

work," *Id.* at 22, ln. 18, and would be out for approximately two weeks.

While at home during that time in November, Farrior was contacted by Clark and Title, who asked if she was going to produce a doctor's note. Farrior did not produce a doctor's note. Under the operative board regulation approved on September 7, 1989 a doctor's note was required for a sick leave of twenty days or more. Farrior testified that when Clark contacted her at home she made an "inappropriate", Tr. Farrior, 11/5/98, at 88, ln. 24, comment: "I told him if he didn't get off my back I was going to call his wife and tell her what kind of person he was." *Id.*, at 89, ln. 5-6. She also testified that it "was not uncommon" for her and Clark to have disagreements. *Id.*, at 92, ln. 23.

On November 14, 1990, the Board approved a new regulation which provided that the Superintendent of Schools or his designee could require a doctor's note for sick leave of less than twenty days' duration. On November 26, 1990, Farrior returned to work and did not provide a doctor's note.

On December 3, 1990, Farrior was informed that a pretermination hearing with the administration would be held that day to discuss her employment situation. At that hearing, Farrior was informed by Clark and Title that her relationship with Clark and other staff members had deteriorated to an unworkable point and that she had taken ten unauthorized days of sick leave without producing a doctor's note upon request. At trial Farrior testified that from time to time tensions had arisen in the office between Farrior, Clark and Hazel Hiltabidel

("Hiltabidel"). Farrior testified that she did not think there was a basis for other employees' perceptions of their relations with her. However, Farrior also testified that although she had disagreements with her supervisor Clark, and co-worker, Hiltabidel, she disputed that the relationship had deteriorated to an unworkable point, as was alleged during her pre-termination hearing on December 3, 1990. Title testified that at the pretermination hearing, he informed Farrior that to his knowledge she had never informed him that her absence in November 1990 was actually sick leave, and also that he told her that he did not interpret the Board's 1989 policy regarding sick leave to bar the administration from requesting a doctor's note for sick leave of less than twenty days' duration. On December 3, 1990, Title and Cattanach recommended that the Board consider the termination of Farrior's employment for the following reasons:

(1) An unauthorized absence from her job from the period November 7, 1990 through November 21, 1990 (10 work days).

(2) A deteriorating relationship with her direct supervisor.

Pl. Exs. 14 and 15. On December 6, 1990, the Board deadlocked on the termination recommendation in a split vote of 4-4.

Sometime between Farrior's sick leave in November of 1990 and the time of the board meeting on December 6, 1990, Farrior had visited board member Larry Levine ("Levine") at his laundromat in New London and spoken with him about her allegations that Clark was double billing on services for the blind and the fact that she was

asked to provide a doctor's note for a sick leave absence of less than twenty days. Farrior testified that she did not mention her conversation with Levine to Title or Clark prior to or during the December 3, 1990 pretermination meeting.

On January 7, 1991, the Superintendent wrote a memorandum to the Board asking if Farrior should be offered a contract "replacing the destroyed copy" which was torn up on November 6, 1990. Def. Ex. 14. On January 10, 1991, Farrior attempted to tender to Title a copy of the November 6, 1990 contract, which she had previously torn up.

Sometime before the February 1991 budget hearings, exactly when is disputed,[1] Farrior and co-worker Traci Santos ("Santos") met with Board members Betty Bresser ("Bresser") and George Yost ("Yost") at Bresser's house. Farrior testified that during her meeting with Board members Bresser and Yost, she informed them of Clark's alleged unauthorized computer equipment purchases and double-billing of services for the blind. Board member Bresser testified that during the meeting at her house, Farrior and Santos discussed unethical business practices by Clark, including issues about payroll taxes, the computer system, and doublebilling for student services, and provided documentation which she used when raising

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[1] The parties do not dispute that a meeting occurred at the house of Board member Elizabeth Bresser, although the testimony at trial conflicted as to the timing of that meeting. Board member Bresser testified that the meeting occurred prior to the budget meeting in February 1991, the plaintiff testified that the meeting occurred sometime between December 6, 1990 and January 10, 1991, and Board member George Yost testified that the meeting occurred sometime in January 1991.

these allegations at a subsequent budget meeting in February 1991.

Yost testified that he did not recall Farrior raising any significant issues during the meeting at Bresser's house. He also testified that Farrior did not provide "one bit of proof or one document" at that time. Tr. Yost, 11/9/98 at 8, ln. 15-16. Yost also testified that the Board did not pursue questions raised by Bresser during a February 1991 budget hearing regarding unethical computer purchases by Clark, because there was no evidence to substantiate the claim. Yost acknowledged that while he did pursue allegations of illegal tax reimbursements, he had no recollection as to where that information originated and had no memory of the issue being raised during the meeting at Bresser's house.

In 1991 Farrior's work responsibilities were greatly reduced by Clark. On February 6, 1991, Clark sent a memorandum to Farrior inquiring whether she worked at Terry Transport during business hours on a personal leave day. On February 18, 1991, Farrior's co-worker Hiltabidel complained to Clark regarding tension in the office and Farrior's conduct. On February 19 and 20, 1991, Farrior's co-worker Ruth Ann Flaherty ("Flaherty") complained to Clark regarding tension in the office and Farrior's conduct. Hiltabidel and Flaherty testified that they did not discuss their complaints with Farrior because they believed it would be futile.

On February 21, 1991, Farrior informed the Board by means of a memorandum that she believed Clark had retaliated against her because she refused "to submit to his personal demands over the past" and based upon her

"recent disclosure of some unethical behavior and mismanagement on his part." Pl. Ex. 27. Addressing why she wrote the February 21st memorandum, Farrior testified, "Because I felt that the Administration was still carrying over a lot of feelings and they were unwilling to let go of what had taken place the night of the board meeting when they voted against termination. And I wanted to see if the Board would help put it to an end." Tr. Farrior, 11/2/98, at 84, ln. 5-9. When asked the meaning of her request, in the same memorandum, that the Board "put a stop to this campaign of retaliation," Pl. Ex. 27, Farrior testified: "Because up to that point every indication I got was that Ed Clark was not going to move on, move forward, put December behind us, and work toward getting the Business Department back on track." *Id.*, at 85, ln. 6-9.

In the February 21, 1991 memorandum, Farrior also asked the Board to "honor its three year contract originally tendered." Pl. Ex. 27. Farrior testified that she was referring to the original September 14, 1990 contract.

On February 28, 1991, Clark reprimanded Farrior for her poor relations with co-workers. Also on February 28, 1991, the Board's attorney wrote to Farrior's attorney to arrange a meeting with the administration in order to comply with the Board's policy for resolving disputes at the lowest possible administrative level.

On March 7, 1991, Farrior submitted a note from her psychiatrist which stated that she should be excused from work from March 7, 1991 until April 1, 1991. On March 11, 1991, Clark gave Farrior a poor evaluation. On March 12, 1991, Title asked Farrior for a medical release so he

could ask her psychiatrist for a more specific explanation of her absence.

On March 20, 1991, Title wrote a letter to Farrior informing her that on the following day the Board would address the complaints made against her by co-workers. On March 21, 1991, Superintendent Cattanach informed the Board that he was concerned that one or more Board members had made efforts on behalf of Farrior, by telephoning other Board members, before they had even heard the administration's reasons for recommending her dismissal. He made reference, *inter alia*, to Board members helping employees spread "unfounded, inaccurate" charges concerning the purchase of the computer system. He also made reference to Bresser and Yost asking questions about his expense reimbursements. The allegations related to Cattanach and Clark. He stated that because the Board had refused to support his dismissal recommendation he did not have the necessary authority to resolve the complaints of Farrior's co-workers. He referred to Farrior and Santos as "two employees who have declared war on their bosses." Cattanach noted that he had offered Farrior an opportunity to meet with himself, Clark, Title and a facilitator, Sharon Palmer, but that Farrior had declined.

Farrior submitted a doctor's note on April 9, 1991 which stated that she was unable to work "due to medical reasons," Pl. Ex. 37, and another note on April 20, 1991 stating that she would be able to return to work on May 1, 1991. Farrior returned to work on May lst. Farrior, her attorney, and Superintendent Cattanach met at some date after April 25, 1991 to discuss her "concerns." Tr. Farrior, 11/3/98, at 5, ln. 14.

On June 11, 1991, Clark reprimanded Farrior for the quality of her work. On June 28, 1991, Clark gave Farrior a poor evaluation, in writing. On June 29, 1991, Clark reprimanded Farrior for being late for computer training and for negative relations with her co-workers.

On July 25, 1991, the Board's attorney sent Farrior a one-year contract offer, approved by the Board on May 23, 1991, which included a four percent salary increase and would "supercede all prior agreements." Pl. Ex. 80. On August 15, 1991, Clark reprimanded Farrior for poor relations with her co-workers. On October 11 and 16, 1991, Clark reprimanded Farrior for her work product and hostile relations with her co-workers. On December 12, 1991, Clark reprimanded Farrior for insubordination regarding the release of a computer file password.

Clark testified that he attempted to resolve disputes at the lowest administrative level when he offered to go to counseling with Farrior, who refused the offer and suggested that he seek counseling on his own.

At some point after the March meeting of the Board, Cattanach's tenure as Superintendent ended. Randall Collins ("Collins") had assumed the position of Superintendent on November 18, 1991. Collins testified that Farrior had filed a lawsuit in state court, naming the Board as a defendant, eight days before he started work as the new superintendent. In response to that lawsuit, the Board approved a December 12, 1991 request by Collins to extend the deadline for the budget so that Collins would have time to review the budget and investigate Farrior's claim of budget improprieties.

On December 27, 1991 an altercation in the office occurred between Farrior and Clark. On January 6, 1992 Collins discussed Clark's December 12, 1991 reprimand with Farrior, as well as the altercation between Farrior and Clark on December 27, 1991. He placed Farrior on non-punitive administrative leave until he had an opportunity to conduct an investigation. Collins testified that he believed the December 27, 1991 altercation between Farrior and Clark "was orchestrated for my benefit." Tr. Collins, 11/10/99, at 12, ln. 25.

Collins testified that he asked Farrior for her password and she provided it to him. However, subsequently he was informed by members of the business office that the password Farrior provided, i.e., "cookie," did not open all the computer files relating to the budget. A substitute secretary was called into the office to determine which files were protected. The secretary found a second password, i.e., "bitch." Farrior contended that information protected by the password "bitch" was not important. The Board's witnesses disagreed.

On January 23, 1992 and February 13, 1992, the Board instructed Collins to meet with Farrior and investigate Clark's alleged misconduct. On February 10, 1992, the Board offered to place Farrior in another position outside the business office. Collins testified that he considered his offer for Farrior to work in the student computer lab to be a temporary assignment so she could return to work while he was investigating her claims. He also testified that based on her interest in computers, he considered Farrior qualified for the temporary assignment. Farrior testified that she did not believe she had the necessary computer skills for the position offered to her outside the

business office and that she "felt a transfer was an act of demotion." Tr. Farrior, 11/3/95, Tr. 56, ln. 9-10. Collins testified that, according to Board policy, transfers are subject to availability, vacancy and the qualifications of employees.

Regarding his investigation, Collins testified, "I was very concerned with what Mrs. Farrior thought about the unbiased nature of my investigation. I felt that if, in fact, I did conduct an unbiased investigation and if, in fact, she acknowledged it as so, that we might be able to resolve all the issues." Tr. Collins, 11/10/98, at 36-37, ln. 25, 1-5. Collins testified that he placed Clark on administrative leave during the investigation in response to the plaintiff's claim that the investigation would not be fair otherwise.

On March 25, 1992, the Board met with Farrior to discuss her allegations of unethical conduct by Clark. Collins met with Farrior and her attorney on March 25, 1992, April 7, 1992, and April 29, 1992, which included a meeting where he discussed Clark's reprimand regarding the computer password, but in each instance he was unable to resolve the employment disputes. Collins testified that on April 7, 1992 he collected all relevant documents and discussed each of them with Farrior and her attorney. Collins concluded that his review of the documents relating to Farrior's allegations of unethical business practices by Clark failed to substantiate her claims.

On May 14, 1992, Collins recommended the termination of Farrior's employment on the following grounds:

(1) Ms. Farrior's conduct in recent years has substantially contributed to a deteriorating work environment in the business office.

(2) She was insubordinate to her immediate supervisor, the business manager.

(3) She was insubordinate to the Superintendent of Schools.

(4) Her insubordinate conduct interfered with the development of the 1992-93 school budget.

(5) During my investigation of her charges against her supervisor, Ms. Farrior misrepresented certain facts.

(6) She withheld information regarding alleged misconduct on the part of her immediate supervisor which should have been presented to the administration and the Board of Education in a timely fashion.

(6) [sic.] This information was withheld until such time as Ms. Farrior thought that she could use it to strengthen her position in contract negotiations.

(7) She failed to comply with school board policy in performing her duties particularly with regard to the disposition of surplus property.

(8) She persisted in falsely accusing the administration of preventing her from presenting her allegations of wrongdoing directly to the school board.

Def. Ex. 39.

On cross-examination, Collins testified that under a system of progressive discipline a reprimand could not be converted into a termination, but also that Farrior's withholding of the password was one of the issues he brought to the Board when recommending that her employment be terminated.[2]

After a termination hearing on July 27, 1992 to terminate Farrior's employment on the following grounds:

(1) She was insubordinate to her immediate supervisor, the Business Manager, on December 11, 1991, when she refused to disclose a computer password when requested by the Business Manager to do so.

(2) She was insubordinate to the Superintendent of Schools on or about January 6, 1992, at which time he requested that she provide the computer password for access to budget information. In response, Ms. Farrior supplied one password, but withheld another which she claims would not have provided access to budget information but which in fact was required for that purpose.

(3) The insubordinate conduct complained of in paragraphs 2 and 3 had the effect of

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[2] Farrior contends that Collins violated the Board's progressive discipline policy by failing to offer a pre-termination hearing before his recommendation for termination, since there had already been prior discipline (Clark's December 12, 1991 reprimand) for the password incident and the leave of absence relating to the December 27, 1991 incident was non-punitive.

interfering with the development of the 1992 93 school budget.

(4) She failed to make timely disclosure of alleged misconduct on the part of her supervisor and, instead, withheld these allegations until such time she could use the information for her own benefit.

(5) She persisted in falsely accusing the administration of preventing her from presenting her allegations of wrong-doing against her supervisor directly to the school board.

Pl. Ex. 66. At the July 27, 1992 termination hearing, Farrior's attorney cross-examined witnesses offered by the administration and offered additional witnesses to testify on her behalf. The Superintendent was also represented by counsel, and the Board had an independent attorney who acted as its procedural advisor.

Bresser was a member of the Board on July 27, 1992. She was called by the plaintiff as a witness at trial. Describing her reaction to the termination hearing on July 27th, Bresser testified as follows:

> I thought that it had seemed like a whistleblower issue because an employee of the town was bringing to the Board of Education or to me and to her superiors things that she thought were not right and could be illegal. And it had seemed unfair.

Tr. Bresser, 11/4/98, at 7, ln. 12-16. Bresser also testified that at the July 1992 termination hearing, the Board came up with findings of fact with respect to the grounds for Farrior's discharge and voted as to whether, based upon those factual findings, Farrior should be discharged. *See*

Tr. Bresser, 11/4/98, at 12-1.3. In addition, Bresser testified that she considered Collins to be a man of integrity.

Paul Havener ("Havener") was a member of the Board on July 27, 1992. He was called by the plaintiff as a witness at trial. Havener testified that at the July 27, 1992 termination hearing, he voted against terminating Farrior's employment because:

> It was based on what I felt was unfair – an unfair treatment of her. I can't say much more than that. Like I say, it's been such a long time, some off the particulars are –

Tr. Havener, 11/27/98, at 17, ln. 6-9. Havener also testified that he thought it was "terrible" that the termination hearing began at 7:00 p.m. on the evening of July 27, 1991 and continued until 5:00 a.m. the next morning.[3] *Id.* at 12, ln. 23.

Havener testified that he was a friend of Farrior. Collins testified that from his first day in the Waterford school system, he had been pressured by Havener to act in favor of Farrior, that in this connection Havener had threatened Collins' career in Waterford, and that Collins addressed this pressure on February 27, 1992 by reading a prepared statement to the Board.

Collins also testified that no Board member ever indicated to him that he or she would discharge Farrior because she had spoken out concerning alleged unethical

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[3] The court notes that it entered summary judgment in favor of the Board with respect to Farrior's claim that the length of the termination hearing constituted a violation of due process.

business practices or mismanagement of funds. Yost testified that no Board member ever suggested terminating Farrior on the basis of her allegations regarding Clark's business practices.

Farrior testified that, whether or not any factual basis for criticism of her existed, all of the reprimands and disciplinary actions taken against her were the result of retaliatory conduct. She testified that she believed the Board had violated its own policies in several ways. Farrior testified that she believed the Board's 1989 policy on sick leave was violated by the administrators' demands that she provide a doctor's note for absences of less than twenty days duration during November 1990. Farrior also testified that she believed the Board's 1990 revised policy on sick leave was violated by Title's attempt to require more detail from her doctor as to the reasons for her medical leave in April to May of 1991. Farrior testified that Clark's June 28, 1991 written evaluation violated the Board's policy that the purposes of evaluation were: (1) to improve employee performance and assist in decisions and (2) that the evaluator should strive to maintain and improve the employee's image, self respect and should focus on strengths and weaknesses. *See* Pl. Ex. 45.

Farrior testified that she believed that the Board's policy that disputes be resolved at the lowest level was violated by the reprimands and adverse employment action taken against her on the basis of complaints made by Hiltabidel and Flaherty. Farrior testified that she believed the Board's policy on assignment/transfer/reassignment was violated with respect to her because she was not qualified for the student computer lab assistant

position offered to her by Collins. Farrior testified that she was treated differently from co-workers because she was asked to account for personal time off when other members of the business office had personal time routinely approved, and by the tone and content of Clark's memoranda.

IV. Discussion

While the jury's verdict "should rarely be disturbed," *Dunlap-McCuller*, 980 F.2d at 158, this case is one where the "verdict appears to be against the weight of the evidence," *Kirsch*, 148 F.3d at 149. The defendant here is the Board, not Clark, not Cattanach, and not Title. Thus, the key issue is the direct and circumstantial evidence could show as to whether the Board terminated Farrior's employment in violation of her rights under the First Amendment and whether the Board ratified a retaliatory systematic attack on her performance by one or more of her supervisors in violation of the First Amendment.

The weight of the evidence in this case, to date, is that Farrior was an employee in the Board's business office who was involved in conflict with both her co-workers and her supervisors, revolving around a variety of matters. Among the supervisors with whom she was in conflict was the Superintendent, himself. At a minimum, it can be said she was not an insignificant contributor to the conflict. The Superintendent, with the support of others in the administration, recommended to the Board that it terminate Farrior. This Superintendent had been accused of improprieties by Farrior. The Board deadlocked 4-4.

After the meeting at which the Board deadlocked on the issue of whether to terminate Farrior, her co-workers continued to complain about her, and Farrior wrote a memorandum to the Board. The Board held a meeting on March 21, 1991. At that meeting, the Superintendent complained about Farrior's allies on the Board interfering with the business office, the Board also heard about the conflict involving Farrior and her co-workers and supervisors.

Approximately seven months later, a new superintendent arrived. He had no previous history with Farrior. Farrior never made any accusation against him. He conducted an investigation and ultimately recommended to the Board that Farrior be terminated based on nine reasons. The Board conducted a lengthy hearing at which Farrior was represented by counsel. The Superintendent was also represented by counsel, and the Board had an independent attorney present who served as the Board's procedural advisor. After a lengthy hearing, the Board came up with findings of fact with respect to the grounds for Farrior's termination and voted as to whether, based upon those factual findings, Farrior should be terminated. The majority of the Board voted to terminate Farrior based on five reasons, and there was clearly a basis on which the Board could conclude in good faith that those reasons were valid.

Farrior contends that

> [ ] the timing of the retaliation closely followed plaintiff's disclosure to Board members Levine, Bresser and Yost. Those disclosures were made at Ms. Bresser's house in January, 1991. Thereafter, beginning in February, shortly after the

> Board budget hearings began, Mr. Clark and Dr. Title, as well as the Superintendent and Board itself on March 21, began a series of retaliatory measures most of which were not supported by the Board's own policies.

Pl. Mem. Oppos. (doc. #147) Section I.E.

Farrior also emphasizes the fact that the Board was aware that the administration had requested that Farrior provide a doctor's note for a sick leave of less than 20 days, which she contends was a violation of Board policy, and also that the Board was aware of memoranda by her co-workers which were hostile to Farrior and held a hearing to address her co-workers' complaints.

Farrior can properly argue, based on circumstantial evidence that various members of the administration, namely, Clark, Cattanach and Title, began a series of retaliatory measures against Farrior and/or that they took various actions with respect to her that were not consistent with Board policies. She can also properly argue that the Board violated its own policies with respect to the March 21, 1991 meeting. However, to conclude that the Board not only violated Board policy by holding the hearing on March 21, 1991, but did so because it was retaliating against Farrior for speaking out to Board members requires drawing an inference counter to the weight of the evidence.

There is overwhelming evidence that Cattanach, Title, Clark and at least two of Farrior's colleagues were very upset by the actions of an employee, i.e., Farrior, the Board had deadlocked on firing. Farrior had written a

memorandum to the Board. There are various other inferences that could be drawn as to the Board's motivation in holding the March 21, 1991 hearing. Farrior argues one should draw the only one of those inferences that runs counter to the weight of the evidence. More is required before one concludes that the Board was acting to retaliate against Farrior by holding this hearing.

Farrior can properly argue that the Board was aware of actions taken by the administration that were in violation of Board Policy and that the Board was aware that her co-workers were hostile towards her. However, the weight of the evidence here is that in dealing with Farrior, the Board conducted its affairs in the manner it, customarily did, with the exception of the unusually long termination hearing on July 27, 1992.

The plaintiff also contends that the Board retaliated against her, and acted with the intent to ratify the actions of others who were retaliating against her, at the July 27, 1999 termination hearing. The evidence shows, however, that the Board acted on what Collins presented to it, but even then did not accept all of the recommendations made by Collins. Moreover, Collins, as the new Superintendent, had not been accused by Farrior of anything. He had placed Clark on administrative leave and had offered Farrior a job in another department. He had no apparent motivation to retaliate against Farrior or to go along with the Board or others if they were doing so. Moreover, Bresser, who testified on behalf of Farrior, admitted that she considered Collins to be a man of integrity.

This leads the testimony of Bresser and Havener, each of whom was both a friend of Farrior and a member

of the defendant Board. In view of the fact that each of Bresser and Havener had an insider's view of the workings of the Board, the testimony of each is most noteworthy for its vagueness.

There is no indication, in this record, that Board members who acted to retaliate against Farrior and/or ratify the actions of those who did, conspired outside of Board meetings to, in essence, manipulate the results of the July 27, 1992 hearing so that Farrior would be terminated. There is no basis, in this record, to reach any conclusion other than the conclusion that the Board members who allegedly were retaliating against Farrior and/or ratifying the actions of those who had been retaliating against her, took the steps necessary to do so at Board meetings. However, there is no evidence either of actions taken by them at Board meetings that would support a conclusion that they sought to achieve such a goal. What evidence there is indicates that any such activity had occurred, Bresser and Havener would have been in a position to observe it and report on it. A reasonable inference would be that, given their friendly relations with Farrior, such activity would have made an impression on them.

However, Bresser's testimony was that the Board came up with findings of fact with respect to the grounds for Farrior's discharge and voted as to whether, based on those factual findings, Farrior should be discharged. She suggests in that statement nothing inappropriate about the way in which the Board proceeded. Moreover, as noted above, she testified that she considered Collins to be a man of integrity. When she made her statement about a "whistle blower issue," she did not say that the

Board was retaliating against Farrior because Farrior was a whistle blower, nor that the Board was intentionally approving the conduct of those who had done so; she was not asked either of these questions directly.

Havener simply felt that Farrior was treated unfairly. He did not specify why he felt she was treated unfairly, although the most reasonable inference to be drawn from his testimony would be that he believed it was unfair for a termination hearing to continue on until 5:00 a.m. in the morning. However, based on the other evidence about the reasons why the hearing continued an into the early hours of the morning, the inference consistent with the weight of the evidence would be that the Board was being more than fair to Farrior.

Perhaps if Bresser and Havener had been queried, by either party, as to what actions the Board took that were not normal or customary for it to take, or as to what normal and customary actions the Board took but in a wav that was unusual, or different, in connection with Farrior's termination, they could have provided more evidence in support of Farrior's claims. But drawing an inference that the Board conducted itself in violation of Farrior's First Amendment rights based on their testimony at this trial is too great a leap to make in view of the very substantial evidence pointing to a conclusion that Farrior was terminated for reasons not related to First Amendment activity.

Therefore, the verdict in this case appears to the court to be against the weight of the evidence.

V. Conclusion

Accordingly, Defendant's Motion for a New Trial [doc. #130] is hereby GRANTED.

It is so ordered.

Dated at Hartford, Connecticut, this 30th day of September 1999.

Alvin W. Thompson
United States District Judge

Supreme Court U.S.
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No. 01-1576

IN THE

Supreme Court of the United States

PEGGY FARRIOR,

Petitioner,

v.

WATERFORD BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The sole issue presented by the Petition for a Writ of Certiorari is whether appellate courts should apply a de novo rather than an "abuse of discretion" standard when reviewing a district court's decision granting a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. In her Petition, the Petitioner claims that the United States Court of Appeals for the Second Circuit erred by using the abuse of discretion standard to affirm the district court's granting of the Respondent's Rule 59(a) motion. The Petitioner argues that the Second Circuit should have instead employed a "greater degree of scrutiny," which she defines as "de novo review or some other form of close scrutiny." Petition for a Writ of Certiorari ["Petition"], p. 24. In fact, the Petitioner asserts that appellate courts "should be *required* to determine de novo whether a new trial order violated the Seventh Amendment," *Id.*, p. 26 (emphasis added).

The Petitioner contends that there is a conflict among circuit courts with respect to this question, going so far as to claim that "[a] majority of the circuits *insist* that orders granting new trials should be subject to greater scrutiny on appeal." *Id.*, p. 5 (emphasis added). Given the Petitioner's equating of "greater scrutiny" with de novo review, one might presume that this purported "majority" of courts had adopted a de novo standard for reviewing the granting of new trials. That, however, is not the case. In fact, every circuit court employs the abuse of discretion standard, and the Petitioner's claims of an inter-circuit conflict are, at best, chimerical.

The Petitioner also seeks to bolster her argument by characterizing the Second Circuit's review of her appeal as perfunctory or somehow incomplete. In granting the motion

for new trial, the district court set forth its reasoning in exhaustive detail. And, in affirming the district court, the Second Circuit clearly considered this comprehensive explication of the trial judge's rationale. In fact, the Second Circuit expressly stated that "the district court's opinion as a whole makes it clear that the right standard was applied and thus we can easily affirm the judgment." Petition, p. 2a. The mere fact that the Second Circuit did not replicate or otherwise regurgitate the trial court's reasoning in its own opinion is hardly a basis for accusing the appellate court of having "summarily concluded that the district court had not abused its discretion." *Id.*, p. 3.

In any event, this Court has already held in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), as well as in a number of prior cases, that abuse of discretion is the proper standard for reviewing the granting of new trials. The Petition presents no new legal arguments or factual permutations that would necessitate a reexamination of those decisions. In short, the Petitioner does not present any compelling justification for obtaining the extraordinary remedy that she seeks. The Second Circuit's decision was proper in all respects, and therefore the Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

I. THE QUESTION RAISED IN THE PETITION HAS ALREADY BEEN DECIDED BY THE COURT.

Rule 59(a) of the Federal Rules of Civil Procedure provides: "A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions

at law in the courts of the United States." Although the Petitioner claims otherwise, the appropriate standard for granting Rule 59 motions is well settled. In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court held: " 'The trial judge in the federal system,' we have reaffirmed, 'has . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.' " *Id.*, at 433 (quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 (1958)). *See also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (appellate courts "review the district court's determination under an abuse-of-discretion standard"); *Allied Chem. Corp., v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court").

As Justice Ginsburg wrote for the majority in *Gasperini*, a trial court's authority to grant a new trial pursuant to Rule 59 "is large." 518 U.S. at 433 (citing 6A Moore's Federal Practice ¶ 59.02[2], pp. 59-44 to 59-46 (2d ed. 1996)). The justification for this authority lies in the recognition that " '[t]he exercise of [the trial court's power to set aside the jury's verdict and grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.' " 518 U.S. at 433 (quoting *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)). After all, " '[i]f it should clearly appear that the jury have committed a gross error . . . it as much the duty of the court to interfere, to prevent the wrong, as in any other case.' " 518 U.S. at 433 (quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (CC Mass. 1822)). And from a practical perspective, "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context' . . .

while appellate judges see only the 'cold paper record.' " 518 U.S. at 438 (internal citations omitted). *See also Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, 67 S. Ct. 752 (1947), quoted in *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 180 (3d Cir. 2000) ("[W]hen reviewing the district court's decision to grant or deny a motion for a new trial, we must give substantial deference to the trial judge's decision 'who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart' "). Thus, the Court reasoned in *Gasperini*:

> If we reverse, it must be because of an abuse of discretion . . . The very nature of the problem counsels restraint. . . . We must give the benefit of every doubt to the judgment of the trial judge.

518 U.S. at 438-39 (quoting *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)).

It cannot be disputed that the Court has established and has reaffirmed abuse of discretion as the appropriate standard to be employed by appellate courts when reviewing a district court's decision granting a new trial. And though the Petitioner now urges the Court to discard the abuse of discretion standard, she fails to provide any compelling justification for such a drastic reversal of this Court's long-standing precedent, which, as discussed, *infra*, is followed by all of the circuit courts. Consequently, the Petition for a Writ of Certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE ABUSE OF DISCRETION STANDARD.

As noted, the Petitioner seeks to have the Court proscribe appellate courts' application of the abuse of discretion standard when reviewing the granting of a new trial. The Petitioner asserts that when a Rule 59 motion has been granted, the reviewing courts should instead "be required to determine de novo whether a new trial order violated the Seventh Amendment." Petition, p. 26. In making these claims, the Petitioner either glosses over or outright ignores this Court's precedent. The Petitioner instead attempts to buttress her argument by asserting that there is an inter-circuit schism between the abuse of discretion and the de novo standards. Petition, p. 24. In fact, she goes so far as to contend that "[a] majority of the circuits *insist* that orders granting new trials should be subject to greater scrutiny on appeal." Petition, p. 5 (emphasis added). A review of the respective circuits' case law, however, quickly and clearly demonstrates that this simply is not true.

The Petitioner admits that the Second, Fourth and Seventh Circuits utilize the abuse of discretion standard when reviewing the granting of Rule 59(a) motions. Petition, pp. 21-23. She claims, however, that the First, Third, Fifth, Sixth, Eight, Eleventh and District of Columbia circuits have adopted this "greater scrutiny" standard, which, as noted, the Petitioner analogizes to a de novo standard of review. *Id.*, pp. 4-20. In fact, all of these circuits, as well as the Ninth and Tenth Circuits, employ the abuse of discretion standard.

For example, in *Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998), the First Circuit held that

" '[t]he trial judge has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence,' " *Id.*, at 355 (quoting *Gasperini*, 518 U.S. at 433), adding that " '[we] then review the district court's determination under an abuse-of-discretion standard.' " 140 F.3d at 355 (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). *See also O'Rourke v. City of Providence*, 235 F.3d 713, 726 (1st Cir. 2001) ("The appellate court's review is for abuse of discretion"). Similarly, the Third Circuit has held: "As an appellate court, we apply the deferential 'abuse of discretion' standard to a district court's grant or denial of a motion for new trial." *McNaboe v. NVF Co.*, 276 F.3d 578, 2001 U.S. App. LEXIS 28578 *17 (3d Cir. 2001). *See also Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999) (appellate court reviews decision "whether to grant a new trial on the basis that the verdict was against the weight of the evidence for abuse of discretion"). The Third Circuit had previously noted: "Such deference is peculiarly appropriate in reviewing a ruling . . . [regarding] the weight of the evidence because the district court was able to observe the witnesses and follow the trial in a way that we cannot replicate by reviewing a cold record." *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735 (3d Cir. 1988).

The Fifth Circuit has held: "Ultimately [a Rule 59(a)] motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited. . . . With this in mind, we review the district court's rulings for abuse of discretion." *Streber v. Hunter*, 221 F.3d 701, 736 (citing *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999)). *See also Reddin v. Robinson Prop. Group*, 239 F.3d 756, 758-59 (5th Cir. 2001) (Although "[o]ur review of a district court's decision to grant a new trial is broader than our review

of a district court's denial of a new trial . . . the standard remains one of abuse of discretion"); *Woodfield v. Bowman*, 193 F.3d 354, 358 (5th Cir 1999) ("The decision to grant or deny a motion for a new trial will be disturbed only for abuse of discretion or misapplication of the law"). Additionally, the Sixth Circuit has held: "We review the grant or denial of a new trial for an abuse of discretion." *Preferred Properties v. Indian River Estates*, 276 F.3d 790, 798 (6th Cir. 2002). *See also Conte v. General Housewares Corp.*, 215 F.3d 628, 637 (6th Cir. 2000) ("[T]he district court's decision . . . to grant a new trial on the basis of the weight of the evidence . . . is reviewed by this court for an abuse of discretion").

Similarly, the Eighth Circuit has held: "The decision to grant a new trial is left to the sound discretion of the trial court and the court will not disturb the trial court's decision absent a clear showing of abuse of discretion." *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001) (citing *White v. Pence*, 861 F.2d 776, 780 (8th Cir. 1992)). *See also Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1017 (8th Cir. 2001) ("We review a conditional grant of a new trial for abuse of discretion"). Both the Ninth and the Tenth Circuits are also in accord. *See e.g.*, *Silver Sage Partners, LTD v. City of Desert Hot Springs*, 251 F.3d 814, 818-19 (9th Cir. 2001) ("We review a district court's grant of a new trial for an abuse of discretion"); *Weese v. Schukman*, 98 F.3d 542, 549 (10th Cir. 1996) ("We review the district court's decision to grant or deny a new trial motion under an abuse of discretion standard"). Similarly, the Eleventh Circuit also applies the abuse of discretion standard. *See, e.g., United States v. Ward*, 274 F.3d 1320, 1323 (11th Cir. 2001) ("[A] motion for new trial is reviewed for abuse of discretion on appeal");

Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183,1186 (11th Cir. 2001) ("We review a district court's grant of a new trial for abuse of discretion").

It is true that in *Tri County Industries v. District of Columbia*, 200 F.3d 836 (D.C. Cir. 2000), *cert. dismissed*, 531 U.S. 287 (2001), the circuit court referred to what it termed a "more searching inquiry," *Id.*, at 840, but the court never defined what such an inquiry entailed, and there is certainly no indication in its opinion that the court intended to adopt a de novo standard of review. Consequently, although the Petitioner relies upon *Tri County*, even a thorough reading of that decision leaves one to speculate as to the meaning and substance of this "more searching inquiry." At no point in its opinion, however, did the *Tri County* court indicate that it intended to discard or even to modify the abuse of discretion standard.

In fact, *Tri County* is not incompatible with the abuse of discretion standard. In *Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137 (2d Cir. 1998), the Second Circuit noted that "[a]buse of discretion" may have different meanings in different contexts," *Id.*, at 141 (quoting Friendly, "Indiscretion About Discretion," 31 Emory L.J. 747, 764 (1982)), but with respect to the granting of a new trial, "[d]eference is 'traditionally accorded to [trial judges in] . . . such post-trial matters' . . . because such decisions turn on factors ' "so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.' " " *Id.*, at 141 (quoting Friendly, "Indiscretion About Discretion," at 760-61, quoting in turn *United States v. McCoy*, 517 F.2d 41, 44 (7th Cir. 1975)). Similarly, in *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380

(7th Cir. 1984), Judge Posner wrote: "[T]he words [abuse of discretion] describe a range of standards . . . in which the amount of deference given the trial judge's rulings varies with the nature of the ruling." *Id.*, at 390.

As is evident, and contrary to the Petitioner's assertions to the contrary, there is no inter-circuit conflict regarding the abuse of discretion standard in the context of reviewing Rule 59(a) motions. The circuit courts are unanimous in holding that abuse of discretion is the appropriate standard to be applied when reviewing a district court's decision granting a motion for new trial. In so holding, the circuits have followed this Court's well-established line of precedent, culminating in *Gasperini*. Therefore, the Petition should be denied.

CONCLUSION

Therefore, for all of the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF FOR PETITIONER

The Question Presented in the petition is as follows:

> In reviewing the decision of a district judge to *grant* a motion for a new trial, should an appellate court utilize a greater degree of scrutiny than would be appropriate in reviewing the *denial* of such a motion?

(Petition, i (Emphasis in original)). Respondent urges, as respondents invariably do, that the courts of appeals are in agreement regarding the question presented. Conspicuously absent from the brief in opposition in this case, however, is any account of *what* that agreement is. Do all circuits agree that greater scrutiny should be applied to orders granting new trials? Do all circuits agree that the standard of review should be the same regardless of whether a new trial was granted or denied? Respondent simply – and tellingly – does not say.

This omission is not some oversight; it lies at the core of the response. The brief in opposition pointedly declines to address whether the Court should grant review of the Question Presented actually set forth in the petition; instead, respondent frames an entirely different question, and addresses only whether its alternative question should be reviewed. The substitute question proposed and discussed by respondent is:

> [W]hether appellate courts should apply a de novo rather than an "abuse of discretion" standard when reviewing a district court's decision granting a new trial.

(Br. Opp. 1).

Respondent's recast question is deliberately worded to obscure the very real conflict among the circuits. Every circuit, respondent argues, has used the phrase "abuse of discretion" to refer to the circumstances in which the award of a new trial will be overturned. (Br. Opp. 5-8). But that does not mean that all circuits are utilizing a single, common standard. To the contrary, at the very end of the brief in opposition respondent makes the fatal concession that in practice the phrase "abuse of discretion" can and often does have very different (and thus conflicting) meanings.

> [T]he words [abuse of discretion] describe a range of standards . . . in which the amount of deference given the trial judge's rulings varies. . . . "

(Br. Opp. 9, *quoting Roland Machinery Co. v. Dresser Industries*, 749 F. 2d 380, 390 (7th Cir. 1984)).

> "Abuse of discretion" may have different meanings in different contexts.

(Br. Opp. 8, *quoting Gasperini v. Center for Humanities, Inc.*, 149 F. 3d 137, 141 (2d Cir. 1998)).

Those differences in meaning are precisely the problem presented by this case. In the Second, Fourth and Seventh Circuits appellate courts will give great deference to the decision of a trial judge to order a new trial. In the First, Third, and District of Columbia Circuits the decision of the trial judge granting a new trial is accorded only limited deference, unlike a decision denying a new trial motion. And in the Fifth, Sixth, Eighth and Eleventh Circuits an appellate court in circumstances such as this will make its own determination of whether a new trial was warranted, according no apparent weight at all to the views of the trial judge. In any of these circuits one can

find decisions using the phrase "abuse of discretion", but the actual standards of appellate review could not be more different from one another. Circuits following the close scrutiny rule have made clear that their occasional use of the phrase "abuse of discretion" does not authorize substantial (or perhaps any) deference to the conclusion of the trial judge. "[T]he label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new trial." *United States v. Cox*, 995 F. 2d 1041, 1044 (11th Cir. 1993).

The differences among these standards is of palpable practical importance. As we noted in the petition, circuits applying a deferential standard almost invariably affirm orders awarding new trials, while circuits applying a more stringent level of review reverse a majority of such orders. (Petition, pp. 12 n. 12, 17-18 n. 19, 22-23 n. 24). Decisions endorsing the close scrutiny standard are not isolated slips of the judicial pen; the petition sets forth 54 such opinions in seven different circuits.

The courts of appeals frankly recognize the important distinctions between these standards. The Second, Fourth and Seventh Circuits in reviewing awards of new trials utilize the same highly deferential standard that they utilize in reviewing denials. In seven other circuits, however, the standard of review where a new trial has been granted is decidedly more stringent than the deferential standard that is applied by all circuits to denials, but that is applied by only three circuits to awards of new trials. It is precisely that difference from the deferential standard that is being highlighted when the majority of circuits describe their standard of review as "closer", "greater", or "broader" – the degree of scrutiny is closer, greater and broader than would be applied by the Second,

Fourth, and Seventh Circuits to decisions ordering new trials. Conversely, it is precisely because of those very differences in the actual standard of review that the Fourth Circuit has rejected the Third Circuit's close scrutiny rule[1] and that the Seventh Circuit repudiates its earlier endorsement of that rule.[2]

Respondent urges that "the question raised in the petition has already been decided by the Court." (Br. Opp. 2). Again, however, respondent declines to explain *how* the Question Presented in the petition itself has assertedly been decided by this Court – whether the Court's past decisions endorse or reject the close scrutiny rule. The decisions of this Court in fact do neither; they merely use the phrase "abuse of discretion", the very vagueness of which has given rise to the longstanding inter-circuit conflict. It is precisely because this Court's past decisions have not resolved that conflict that this Court granted certiorari in *District of Columbia v. Tri County Industries, Inc.*, and should do so here.

There can be little doubt that the new trial order in this case would have been overturned in at least the Fifth, Sixth, Eighth and Eleventh Circuits. The meaning and protections accorded by the Seventh Amendment should not be permitted to vary in that manner depending on the circuit in which a jury trial is held.

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[1] *Gill v. Rollins Protective Services Co.*, 836 F. 2d 194, 196 n. 1 (4th Cir. 1987).

[2] *Medcom Holding Co. v. Baxter*, 106 F. 3d 1388, 1397 and n. 3 (7th Cir. 1997).

CONCLUSION

For the above reasons a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

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